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**Ex Parte Presentation**

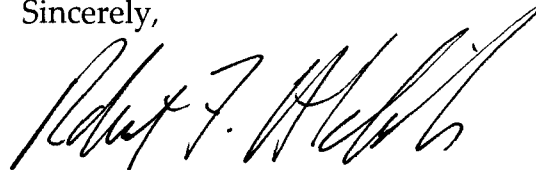
Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W., TW-A325  
Washington, DC 20554

**Re: CC Docket No. 96-128, Illinois Public Telecommunications Association,  
Petition for Declaratory Ruling**

Dear Ms. Dortch:

On May 10, 2006, Michael Ward, counsel for the Illinois Public Telecommunications Association, Keith Roland, counsel for the Independent Payphone Association of New York ("IPANY"), Gary Pace, CEO of Midwest Communication Solutions, Inc., and Robert F. Aldrich of Dickstein Shapiro Morin & Oshinsky LLP, (representing the American Public Communications Council ("APCC")), met with Dana Shaffer, Legal Advisor to Commissioner Deborah Taylor Tate. We discussed the matters summarized in the attached document handed out during the meeting. In addition, we discussed the issues raised in the petition filed by IPANY, which are reflected in the petition and previously submitted comments.

Sincerely,



Robert F. Aldrich

Enclosure

cc: Dana Shaffer



# Section 276 Compliance

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Michael W. Ward  
General Counsel

Illinois Public Telecommunications  
Association



# Overview – Rates Must Comply With New Services Test

- Computer III compliant tariffs and pricing required for ILEC's basic payphone services provided to IPPs (NST). – *Report and Order*, ¶ 147
- “Pursuant to Section 276(c), any inconsistent state requirements with regard to this matter are preempted.” – *Report and Order*, ¶ 147
- States to ensure that compliant tariffs are filed and “effective no later than April 15, 1997.” – *Order on Reconsideration*, ¶¶ 163

# Overview – NST Rates A Prerequisite for Dial Around Compensation

- ILEC payphones eligible for dial-around compensation (DAC) only after ILEC has actually complied with the NST requirements – *Order on Reconsideration*, ¶¶ 131, 163
- ILEC may begin receiving DAC after ILEC self-certifies that ILEC has satisfied NST requirement
- IXC may not deny DAC payments to ILEC after self-certification on IXC claim that ILEC is not in actual NST compliance - *Bell Atlantic v. Frontier Communications*, DA 99-1971, ¶ 28
- However, ILEC certification does not substitute for actual NST compliance – *Bell Atlantic*, ¶ 28
- A certifying ILEC's failure to meet actual NST compliance must be established through FCC or state commission proceeding – *Bell Atlantic*, ¶ 28

# Overview – SBC Illinois Violations

- SBC Illinois payphone operations received DAC since 4/15/97, pursuant to 5/15/97 self-certification
- ICC found that ILEC not compliant with NST prerequisite prior to 12/13/03
- From 4/15/97 through 12/12/03, ILEC unlawfully received \$100s millions in DAC while overcharging IPPs \$15 million through rates exceeding FCC's NST prerequisite

# *Order on Reconsideration*

“We must be cautious, however, to ensure that LECs comply with the requirements we set forth in the Report and Order. Accordingly, we conclude that LECs will be eligible for (dial-around) compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276. LECs may file and obtain approval of these requirements earlier than the dates included in the Report and Order, a revised herein, but no later than those required dates. To receive compensation a LEC must be able to certify the following: ...

5) it has in effect intrastate tariffs for basic payphone services (for “dumb” and “smart” payphones) ...

# RBOC's Request for Temporary Waiver of the NST Requirement

- April 4, 1997 Order: FCC Common Carrier Bureau clarifies that NST applies to state-tariffed “dumb” payphone lines
- April 10, 1997: RBOCs file letter requesting a temporary waiver to ensure that they are eligible for dial-around compensation while bringing payphone line rates into compliance with the NST
- April 11, 1997: RBOCs letter clarifies the request - “Where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs”



# ***Clarification Order, DA 97-805***

Chief, CCB (Released 4/15/97)

- “In the recent Bureau Waiver Order, we *emphasized* that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs’ payphone operations are eligible to receive the payphone compensation provided by that proceeding. The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines ...”

- ¶ 10 (italics added)



# ***Bell Atlantic v. Frontier Communications, DA 99-1971***

Chief, CCB (Released 9/24/99)

“We *emphasize* that a LEC’s certification letter does not substitute for the LEC’s obligation to comply with the requirements as set forth in the Payphone Orders. The Commission consistently has stated that LECs must satisfy the requirements set forth in the Payphone Orders, subject to waivers subsequently granted, to be eligible to receive compensation. Determination of the LEC’s compliance, however, is a function solely within the Commission’s and state’s jurisdiction.”

- ¶ 28 (*italics added*)

# Illinois NST Investigation

- IPTA files Petition with ICC that SBC Illinois does not meet NST requirements and requests investigation –ICC Docket No. 97-0225, 5/8/97
- On 5/15/97, SBC Illinois self-certifies compliance with NST, and begins receiving DAC effective 4/15/97
- ICC grants IPTA Petition and opens ICC NST investigation as ICC Docket No. 98-0195 – ICC Docket No. 97-0225, 12/17/98
- ICC finds that SBC Illinois payphone rates do not comply with NST requirement – ICC Docket No. 98-0195, 11/13/03

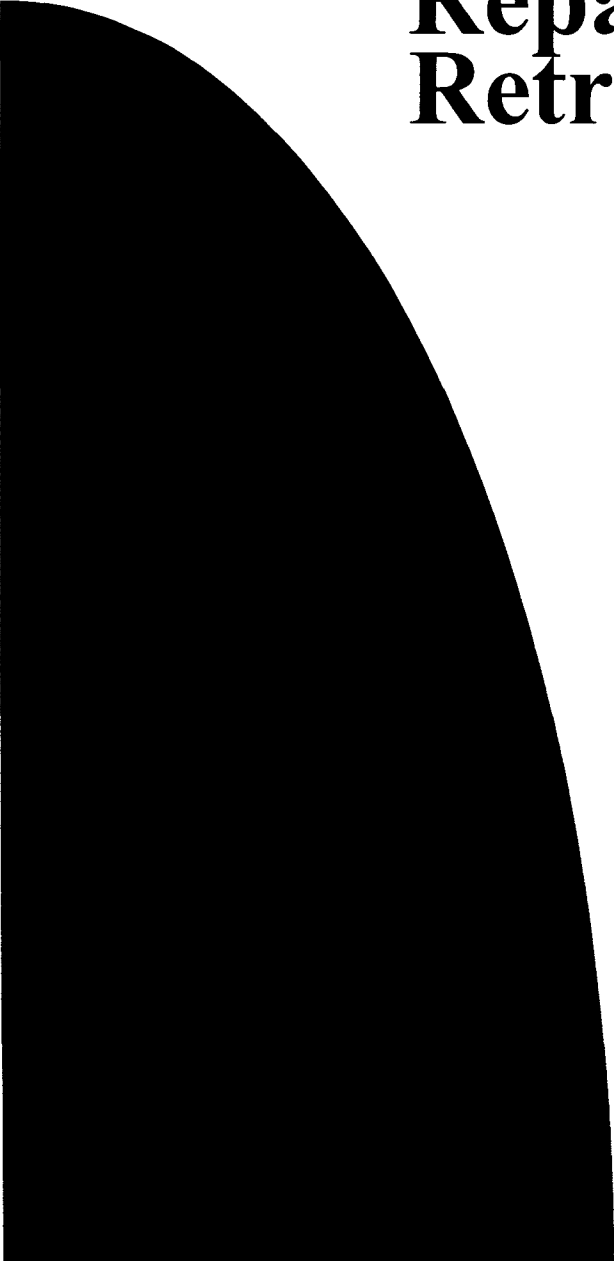
# DAC vs. NST since 4/15/97

- From 4/15/97 to 12/12/03, SBC Illinois collected \$100s millions in DAC through false certification of NST compliance
- From 4/15/97 to 12/12/03, SBC Illinois charged IPPs \$15 million in ILEC payphone service rates in excess of NST
- For SBC Illinois to have effective NST compliance from when it began receiving DAC, IPPs entitled to reparations to extent ILEC rates exceeded the required NST rates since 4/15/97

# Filed Rate Doctrine - Reparations Are Not Retroactive Ratemaking

- RETROACTIVE RATEMAKING:
  - A prospective rate
  - fixed by the Commission
  - after a hearing
  - is of a legislative quality,
  - and may not later subject a carrier to the payment of reparations
  - upon a different Commission determination
  - as to the fact situation existing at the time the previous order was issued.

– *Arizona Grocery*, 284 U.S. 370, 390 (1932)



# Filed Rate Doctrine - Reparations Are Not Retroactive Ratemaking

- REPARATIONS:

- With respect to review of a rate set by a carrier,
- the Commission acts in an adjudicatory capacity,
- and adjudication of the facts
- may involve reparations of an unlawful rate.

—*Arizona Grocery*, 284 U.S. at 186

# Filed Rate Doctrine - Reparations of Legal Rate

- The filed rate is the legal rate, but not the lawful rate if unreasonable.
- “The legal rate was not made by the statute a lawful rate – it was lawful only if it was reasonable.”
- “The Act [gave] ... the Commission the power ... of determining the reasonableness of the published rate. If the finding on this question was against the carrier, reparation was to be awarded ...”

– *Maislin Industries, U.S., Inc.*,  
497 U.S.116, 128 – 129 (citing  
*Arizona Grocery*)

# Rates Violating FCC Orders are Unreasonable

- FCC ordered NST compliant payphone service rates effective 4/15/97
- Effective NST rate is a prerequisite for ILEC to receive DAC
- FCC ordered that whether an ILEC's payphone service rates actually complied with the NST must be determined by a state commission proceeding
- ICC proceedings determined that ILEC payphone service rates not NST compliant prior to 12/13/03
- ILEC payphone service rates in violation of FCC orders are unreasonable per se, entitling IPPs to reparations

# Illinois Appellate Court

- FCC: Cost-based rates must be in effect no later than April 15, 1997. All inconsistent state regulatory requirements are preempted
- ILEC: Certify that tariffed rates effective April 15, 1997 are cost based
- ICC: Tariffed rates are not cost-based and do not comply with Section 276 requirements
- IL App. Ct.: Rates set according to state requirements are the lawful rates until the ICC makes a determination of the federal cost-based rates on November 12, 2003

# Numerous States Have NST Refunds

- Michigan PSC ordered refunds of ILEC charges in excess of NST – MPSC Docket No. U-11756
- Tennessee RA ordered reimbursement of any payments over NST – TRA Docket No. 97-00409
- Kentucky PSC ordered refunds of rates in excess of NST – KPSC Admin. Case No. 361
- South Carolina PSC ordered refunds of rates in excess of NST – SCPSC Docket No. 97-124-C
- Louisiana PSC order approved stipulated agreement providing refunds – LPSC Order No. U-22632
- Pennsylvania PUC order approved stipulated agreement providing refunds – PPUC Docket No. R-0097386700001
- Indiana Utility Regulatory Commission ordered refunds of ILEC charges in excess of NST – Cause No. 40830

# Summary



- FCC ordered ILEC to implement NST payphone service rates no later than 4/15/97 – preempted inconsistent state requirements
- FCC ordered that ILEC not eligible for DAC until implements NST requirement
- ICC determined that ILEC did not implement NST rates prior to 12/13/03
- Since 4/15/97, ILEC received \$100s millions in DAC while overcharging IPPs \$15 million through payphone service rates exceeding FCC's NST requirement – both in violation of FCC orders
- ILEC payphone service rates and DAC receipt from 4/15/97 through 12/12/03 per se unreasonable and unlawful - reparations are due IPPs